

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 38710-s41H BY MYLES D. AND	)	
CAP E. HUPKA	)	

\* \* \* \* \*

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No timely exceptions were received from any party of record. Therefore, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the May 30, 1985 Proposal for Decision, and incorporates them herein by reference.

Based upon the Findings of Fact and Conclusions of Law, and all files and records herein, the Department of Natural Resources and Conservation makes the following:

ORDER

That, subject to the terms, conditions and limitations below, Application for Beneficial Water Use Permit No. 38710-s41H is hereby granted to Myles D. and Capi E. Hupka to appropriate 175 gallons per minute up to 112.85 acre-feet per year from Leverich Creek, specifically: 25 gpm up to 1.5 acre-feet annually for irrigation of lawn and garden of .75 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 12, Township 3 South, Range 5

**CASE # ~~38710~~ 38710**

East, Gallatin County, Montana, and 150 gpm up to 111.35 acre-feet per year for a flow-through recreational fish and wildlife pond with a capacity of approximately .20 acre-feet. The diversion point is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 12, Township 3 South, Range 5 East, Gallatin County, Montana; the period of diversion and use will be May 1 through October 15, inclusive, of each year.


The diversion means for the irrigation use is a pumped underground sprinkler system; for the flow-through pond, there are pipes leading into and from the pond, between the pond and the source, Leverich Creek.

The priority date for the Permit is December 7, 1981, at 10:22 a.m.

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.
- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

- 3) If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicant to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

DONE this 18<sup>th</sup> day of September, 1985.

  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 444 - 6605

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

CASE # 380<sup>710</sup>~~000~~

AFFIDAVIT OF SERVICE  
Mailing

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 17, 1985, she deposited in the United States mail, First Class, a FINAL ORDER by the Department on the Application by Myles D. and Capi E. Hupka, Application No. 38710-s41H, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Myles D. and Capi E. Hupka, 7243 South 3rd Road, Bozeman, MT 59715
2. Chuck and Janie Karnup, 6855 South 3rd Road, Bozeman, MT 59715
3. Robert E. Leo, 6790 South 3rd Road, Bozeman, MT 59715
4. Scott Compton, Water Rights Bureau Field Manager, Bozeman (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 19<sup>th</sup> day of September, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Paul Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-25-1987

**CASE # 38710**

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	ORDER
NO. 38710-s41H BY MYLES D. AND	)	
CAPI E. HUPKA	)	

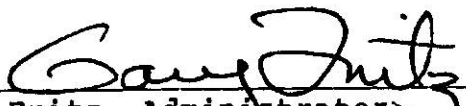
\* \* \* \* \*


The response of the Montana Power Company to the instant show cause order is in substance the same as those involved in numerous similar proceedings. See generally, In re Brown, et. al.. Our decisions therein control the present disposition.

However, although the objection filed on behalf of the Montana Power Company does not embrace these issues by its terms, we on our own motion from the face of the application note an issue of whether the amount of water claimed for the proposed "wildlife pond" will in fact be used "beneficially," and/or whether the proposed means of diversion therefor are reasonable. We cannot issue a permit in this matter before the existence of the same is evident. See MCA 85-2-311, 85-2-312. We do not understand that an appropriation necessarily is perfected by rerouting a portion of the creek, as the face of the application indicates. Montana Power Company is invited, as a sort of amicus curiae, MCA 2-4-102(7), to participate in the resolution of these issues should a formal hearing be necessary in this matter.

WHEREFORE, the objection filed on behalf of the Montana Power Company is stricken insofar as it raises matters of unappropriated water as adverse affect to prior appropriators.

DONE this 24<sup>th</sup> day of April, 1984.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444-6605

  
\_\_\_\_\_  
Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444-6704

AFFIDAVIT OF SERVICE  
ORDER

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by MYLES D. & CAPI E. HUPKA, Application No. 38710-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Myles D. & Capi E. Hupka, 7243 S. Third Rd., Bozeman, MT 59715
2. Robert E. Leo, 6790 S. Third Rd., Bozeman, MT 59715
3. Chuck & Janie Karnup, 6855 S. Third Rd., Bozeman, MT 59715
4. Montana Power Co., 40 East Broadway, Butte, MT 59701
5. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 hand-deliver
6. Scott Compton, Bozeman Field Office (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna K. Elser

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 25th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy John  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3/1/85

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
NO. 38710-s41H BY MYLES D. AND	)	
CAPI E. HUPKA	)	

\* \* \* \* \*

Pursuant to the Montana Administrative Procedure Act and to the Montana Water Use Act, the Department of Natural Resources and Conservation (hereafter, "Department") held a hearing on the above-captioned matter in Bozeman, Montana on May 7, 1985.

Myles D. and Capi E. Hupka, the Applicants, appeared personally by Mr. Hupka.

Chuck and Janie Karnup, Objectors, failed to appear.

Robert E. Leo appeared personally.

Scott Compton, Field Manager for the Bozeman Area Field Office, appeared as a Department staff expert witness.

STATEMENT OF THE CASE

Mr. Leo appeared to express his earlier concerns with the operation of the Applicant's project. At the hearing, he stated that he no longer objected to the Application. Having observed the project the Applicants installed, he stated his satisfaction with the lining of the pond and the Applicants' operation of the inflow structure.

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Mr. Hupka has already installed the project for which the Permit is sought. Essentially, the appropriation consists of a small flow-through pond which diverts water from Leverich Creek. After flowing through the pond, the water is returned to the Creek. Mr. Hupka irrigates his lawn and garden directly from the Creek. The pond is lined to prevent seepage, and the pump provides sufficient head to operate his sprinklers. Mr. Hupka stocks the pond with fish for his own recreational use, and drains the pond during the winter. The inlet and outlet pipes are adequate to keep the flow moving through the pond and back to Leverich Creek.

#### FINDINGS OF FACT

1. The Application was duly filed at 10:22 a.m. on December 7, 1981.

2. The Department has jurisdiction over the subject matter herein and the parties hereto, regardless of whether or not the parties appeared.

3. The pertinent facts of the Application were duly published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on January 27, February 3, and February 10, 1982.

4. The Karnups failed to appear at the hearing, after having received timely notice thereof.

5. Mr. Leo appeared at the hearing but stated that after having inspected the pond, he no longer was concerned with seepage or possible inability to exercise his own water permit.

6. The proposed uses, irrigation of lawn and garden and personal recreational fish and wildlife use, are of material benefit to the Applicant.

7. The appropriation works are adequate and customary and do not result in a waste of the water resource. The pond is approximately 35 to 40 feet wide, 5½ to 6 feet deep, and circular in shape. Water is diverted from Leverich Creek by means of a pipe, and discharges to Leverich Creek by means of another pipe. It is lined with plastic and clay, to prevent seepage. It is pumped dry in October, the period of use being May 1 to October 15, inclusive, each year. The Applicant requests 150 gpm up to 111.35 acre-feet per year for personal fish and wildlife recreational use in the SE¼SW¼NE¼, Section 12, Township 3 South, Range 5 East, Gallatin County, Montana. The point of diversion is the same as the place of use.

8. The diversion point for the irrigation pump is the same as that for the flow-through pond: SE¼SW¼NE¼, Section 12, Township 3 South, Range 5 East, Gallatin County, Montana. The place of use is .75 acres of lawn and garden in the SE¼SW¼NE¼, Section 12, Township 3 South, Range 5 East, Gallatin County, Montana. The amount requested for irrigation use for lawn and garden is 25 gpm up to 1.5 acre-feet per year, periods of diversion and use being May 1 to October 15, inclusive, each year.

9. There is substantial credible evidence on the record herein that there are unappropriated waters sufficient for the proposed use and that the water rights of a prior appropriator

will not be adversely affected by the instant project. The project has been in operation; the irrigation since 1981, and the pond since 1980. The pond has been drained in October with the water being pumped back into Leverich Creek. According to the testimony at the hearing, no interference with downstream rights has occurred either as a result of the pond or the irrigation.

10. Mr. Leo and the Applicant disputed the contentions made by Mr. Karnup in his written Objection filed herein. The Applicant speculated that if the Creek goes dry as Mr. Karnup alleged, it would likely be the result of a diversion and larger pond downstream from his project.

11. Mr. Compton testified that there have been complaints from other water users on Leverich Creek, but that the dispute centers around claimed existing rights for the pond referred to by Mr. Leo and the Applicant.

Wherefore, based on the record herein, the Hearing Examiner makes the following:

#### PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto, regardless of whether or not they appeared.

2. The Department gave proper notice of the Application and the hearing, and all substantive and procedural requirements of law or rule have been met, and therefore the matter was properly before the Hearing Examiner.

3. The Karnups are in default pursuant to Rule 36.12.208, Administrative Rules of Montana. The Karnups received timely notice of the hearing. The Karnups' objection hereto is hereby dismissed pursuant to the above-cited rule.

4. The Department must issue a permit if the Applicant shows by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
- (i) at times when the water can be put to the use proposed by the applicant;
- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

5. The Applicant has shown by substantial credible evidence that there are unappropriated waters in the source of supply; at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available; the water rights of a prior appropriator will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a

beneficial use and will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. The Karnups having defaulted, the instant Permit is uncontested.

Wherefore, based on the foregoing, the Hearing Examiner hereby issues the following:

PROPOSED ORDER


Subject to the following terms, restrictive conditions, and limitations below, that Application for Beneficial Water Use Permit number 38710-s41H by Myles D. and Capi E. Hupka be granted to appropriate 175 gallons per minute up to 112.85 acre-feet per year from Leverich Creek; 25 gpm up to 1.5 acre-feet annually for irrigation of lawn and garden of .75 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 12, Township 3 South, Range 5 East, Gallatin County, Montana; the diversion point to be in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 12, Township 3 South, Range 5 East, Gallatin County, Montana. The period of diversion and use will be May 1 through October 15, inclusive, of each year, 150 gpm up to 111.35 acre-feet per year will be used for a flow-through recreational fish and wildlife pond with a capacity of approximately .20 acre-feet.

The diversion means for the irrigation use is a pumped underground sprinkler system, for the flow-through pond, there are pipes leading into and from the pond, between the pond and the source, Leverich Creek. The priority date for this Permit is December 7, 1981 at 10:22 a.m.

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana law.
- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
- 3) If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicant to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

- 4) The Permittee shall keep adequate records of the amount diverted and submit them to the Department on request.

DONE this 30<sup>th</sup> day of May, 1985.

  
Sarah A. Bond, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6625

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).



AFFIDAVIT OF SERVICE  
Mailing

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark    )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 31, 1985, she deposited in the United States mail, First class mail, an order by the Department on the Application by Myles D. and Capi E. Hupka, Application No. 38710-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

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2. Chuck and Janie Karnup, 6855 South 3rd Road, Bozeman, MT 59715
3. Robert E. Leo, 6790 South 3rd Road, Bozeman, MT 59715
4. Scott Compton, Water Rights Bureau Field Manager, Bozeman (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

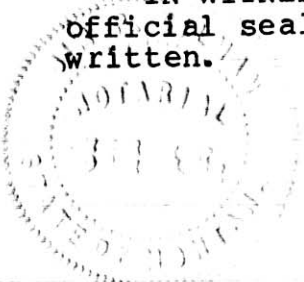
DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark    )

On this 31<sup>st</sup> day of May, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Ann P. Gilman

Notary Public for the State of Montana  
Residing at Helena Montana  
My Commission expires 1-21-1987

CASE # 38710